

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTOR M. DIAZ)	
Claimant)	
VS.)	
)	
NATIONAL BEEF PACKING CO.)	Docket No. 1,009,022
Respondent)	
AND)	
)	
FIDELITY & GUARANTY INSURANCE)	
Insurance Carrier)	
)	

ORDER

Respondent and Fidelity & Guaranty Insurance, one of respondent's insurance carriers (Fidelity), appeal the June 25, 2003, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Judge Fuller ordered the payment of claimant's requested medical treatment by respondent and both of its insurance carriers "equally."¹

Fidelity argues that claimant's request for preliminary benefits should be denied because claimant failed to provide timely notice and written claim.² These issues are considered jurisdictional and are subject to review by the Appeals Board (Board) on an appeal from a preliminary hearing Order.³

¹ Order for Medical Treatment (June 25, 2003).

² K.S.A. 44-520; K.S.A. 44-520a(a).

³ K.S.A. 44-534a(a)(2); K.S.A. 551(b)(2)(A).

Claimant argues that his hernia is a repetitive use injury as opposed to a single traumatic accident. Claimant alleges a series of accidents beginning “[a]pproximately May 2002 and each and every working day thereafter[.]”⁴ At least for purposes of preliminary hearing, Fidelity does not dispute that claimant suffered a work-related accident on May 31, 2002. But Fidelity does dispute that claimant thereafter suffered a series of work-related aggravations. Claimant is still working for respondent. Accordingly, claimant contends that because his series of accidents is ongoing his notice and written claim were both timely made.

Date of accident is not a jurisdictional issue on an appeal from a preliminary hearing order. Therefore, the Board will only address that issue to the extent it is necessary to resolve the jurisdictional issues of notice and written claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the preliminary hearing held on June 13, 2003 before Pamela J. Fuller, the only evidence presented was the testimony of claimant. Claimant testified he began working for respondent in September of 2000 and that he is still working for respondent now. He stated that in May of 2002, “I pulled on a gut and I felt something warm and it pulled and pain. I called the supervisor and I could no longer do it ‘cause it hurt.”⁵ Claimant testified that he reported the pain to the nurse’s office. The company nurse provided him treatment of ice and Ibuprofen. He was subsequently assigned an easier job for 2-3 weeks. Thereafter, his symptoms decreased and claimant was put back on his regular job. This caused his pain to increase. Claimant visited the nurse’s office again in January or February of this year seeking treatment for the pain at which time he was told that respondent could not send him to a doctor because his injury did not happen at work. Respondent presents no evidence to controvert any of claimant’s testimony.

Based upon the uncontradicted testimony of claimant the Board finds claimant gave notice within ten days of his accident regardless of whether that accident was a single traumatic event in May 2002 or if it was a series of accidents. Written claim, however, is more problematic because claimant acknowledges he did not make a written claim until his attorney sent a certified letter to respondent on February 6, 2003. This was more than 200 days beyond May 31, 2002, and there is no allegation that the time to make written claim was extended by virtue of either the furnishing of medical treatment or the respondent’s failure to file an employer’s report of accident with the Division of Workers Compensation.⁶ Accordingly, claimant relies on there being a series of accidents to extend his time.

⁴ K-WC E-1 Application for Hearing (filed Feb. 18, 2003).

⁵ P.H. Trans. at 5.

⁶ See K.S.A. 44-557(c).

Based upon the record compiled to date, the Board finds claimant's uncontradicted testimony of his worsening symptoms to be credible evidence that supports claimant's contention that he suffered a series of aggravations at work. Consequently, the Board upholds the determination of Judge Fuller.

WHEREFORE, Administrative Law Judge Fuller's preliminary hearing Order dated June 25, 2003 is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and Fidelity & Guaranty Insurance
Terrance J. Malone, Attorney for Respondent and Liberty Insurance Company
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director